



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT ELDORET

CIVIL CASE 59 OF 2000

JASAN K. KOSKEI T/A TACHASIS WHOLESALERS.....PLAINTIFF

VERSUS

NATIONAL BANK (K) LIMITEDDEFENDANT

RULING

This is a preliminary objection to an application brought by way of Notice of Motion and filed by Messrs. Katwa and Company Advocates on behalf of Jasan K. Koskei T/A Tachasis Wholesalers, dated 28th February 2005. That application was brought under certificate of urgency. It was said to be brought under Order 50 rule 1 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act (Cap.21) Laws of Kenya, Section 3 of the Judicature Act (Cap.8) Laws of Kenya and Section 7 of the Constitution of Kenya.

The application seeks for orders: -

- (a) That this application be heard *ex parte* in the first instance.
- (b) That the court be pleased to stay the sale by public auction of the plaintiff's property being LR. No. Eldoret Municipality/Block 5/46/1 and LR. No. Eldoret Municipality/Block 9/1727 scheduled for 2nd March 2005 pending the hearing and determination of this application.
- (c) That the costs of the application be costs in the cause.

At the hearing of the application on 19th April 2005 Mr. Kuloba for the respondent raised preliminary objections. The respondent had filed notice of intention to raise preliminary objections on 9th March 2005. Listing five objections in that notice. Mr. Kuloba argued objections as three grounds. Firstly, that the application was to stop a sale from taking place on 2nd March 2005. That date had already passed and therefore the application had been overtaken by events, and could not be sustained. The second objection was that the application was *res judicata*. On the 4th April 2003 this court ruled in a comprehensive way and dismissed the applicants application seeking to stay the sale.

That order of the court had not been set aside and was still valid. Under Section 7 of the Civil Procedure Act (Cap.21 Laws of Kenya) an issue which had been finally determined by the court could not be revived and argued before court. Therefore, the orders sought in this application could not be issued as the earlier ruling had determined the matter. He raised a third ground that the attachments to the supporting affidavit were not commissioned as required by rule 5 of the Oath and Statutory Declaration Act (Cap.15). Therefore, the application should be dismissed.

Mr. Kemboi for the applicant submitted that prayer (b) of the application could still be granted. The application was made to enforce an order of the court made on 30th April 2004. That order was still in existence. The application of 7th July 2003 had not yet been heard and determined. Therefore the application of 28th February 2005 was deliberately worded the way it was worded. He further submitted that it was true that the court made a ruling on 4th April 2003 dismissing the application for an injunction. However, on 7th July 2003 the applicants made an application to review those orders of the court.

That was how on the 30th April 2004, orders were granted by the court. He also submitted that the current application was not seeking the same prayers as was sought in the application in which a ruling was given on 4th April 2003. He sought to rely on the case of Broadmoor Hospital Authority –vs- R. [2000] 2 ALL ER 727 on equitable remedies. On the attack on annexures to the supporting affidavit, he submitted that the counsel for the respondent had not identified the annexures which were not commissioned. In any event those annexures would be expunged from the affidavit and the rest of the annexures would remain. He sought to rely on the case of Mukisa Biscuits Ltd. –vs- West End Distributors Ltd. [1969] EA 696.

I have considered the submissions of both counsel for the parties and have perused the documents on record. It is true that the application dated 28th February 2005 seeks under prayer (b) for orders that the sale of the subject plots which was scheduled for 2nd March 2005 be stayed. The matter came before Hon. Justice Gacheche on the 28th February 2005. Temporary orders were issued by the court in favour of the applicant's in terms prayer (b). The matter was fixed for hearing interpartes on 9th March 2005. That meant that the sale would not have continued on 2nd March 2005. In the application herein, The applicant did not ask for any additional orders of stay beyond 2nd March 2005. In those circumstances, I find that the application was rendered superfluous after 2nd March 2005. The applicant, in the grounds of the application stated that the sale scheduled for 2nd March 2005 was in contravention of a court order made on 30th April 2004. However, he did not specifically ask the court to order compliance by the respondent with that court order of 30th April 2004. This court cannot speculate on that. It was his obligation to ask for the orders from this court. Even if this application was heard today, this court cannot issue orders beyond what was specifically prayed for by the applicant. Therefore I find that the application dated 28th February 2005 has been spent.

This ground of objection succeeds.

On whether the matter is res judicata, section 7 of the Civil Procedure Act (Cap.21 Laws of Kenya) provides –

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or in a suit in which such issue has been raised and has been finally decided by the court.”

It is not in dispute that the matter was in court and a ruling was made on 4th April 2003. It is also not in dispute that another ruling was made by the court on 30th April 2004. The applicant's counsel has submitted that they filed the current application to enforce the ruling of 30th April 2004. In that ruling, stay of sale scheduled to take place on 5th May 2004 was granted. The orders granted by the court were orders pending hearing of the application dated 7th July 2003. That application was to be heard on 30th September 2004.

From the record, nothing appears to have happened on 30th September 2004 until 15th December 2004 when another application dated 16th November 2004 was listed for hearing on 2nd March 2005 by Messrs. Katwa and Company Advocates for the applicants. In view of the number of applications involved and which are still pending in this matter, I am hesitant to find that the issue of the sale was ultimately determined by the court to amount to res judicata.

However, the decision of this court made on 30th April 2004 was an interlocutory decision pending the hearing and determination of the application dated 7th July 2003. That application was fixed by this court

for hearing on 30th September 2004. The applicant, instead of pursuing that application is pursuing other applications. I therefore order that the application dated 7th July 2003 be heard interpartes on 21st September 2005 and the orders of stay of sale will only extend up to that date.

As for the issue of some of the documents in the supporting affidavit not having been commissioned, I have perused the replying affidavit, and I have seen that the documents attached were commissioned. Mr. Kuloba did not point at any particular document that was not commissioned. However, if there are any that were not commissioned, that matter can still be taken at the hearing of the respective applications, so that the said documents can be expunged or ignored by the court in determining or considering the matter. In that event, the supporting affidavit will still stand, but those documents which are not commissioned will not form part of the affidavit and will be ignored by the court.

As the present application has just sought for one substantive prayer for stay of the sale that was schedule for 2nd March 2005, which date had passed when this application came for hearing on 19th April 2005, I find that this application has been rendered superfluous. It therefore, it serves no purpose to have the application substantively heard at this time. I mark it as overtaken by events. I order that the application dated 7th September 2003 will come for hearing on 21st September 2005. The orders for stay of will lapse on that day. Costs in the cause

Dated and Delivered at Eldoret this 9th Day of June 2005

George Dulu

Ag. Judge

In the Presence of: Mr. Murei for plaintiff

Mr. Fundi for defendant